No. 06-157

In the Supreme Court of the United States

JAY F. HEIN, DIRECTOR, WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL.,

Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the standing principle recognized in *Flast* v. *Cohen*, 392 U.S. 83 (1968), and reaffirmed unanimously in *Bowen* v. *Kendrick*, 487 U.S. 605 (1988), permits taxpayers to challenge on Establishment Clause grounds an expenditure of funds pursuant to a congressional appropriation when that expenditure is fairly traceable to the allegedly unconstitutional conduct.

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 433 F.3d 989. The order of the court of appeals denying the government's petition for rehearing and rehearing en banc and the accompanying concurring and dissenting opinions (Pet. App. 58a-66a) are reported at 447 F.3d 988. The opinion of the district court granting the government's partial motion to dismiss the complaint (Pet. App. 27a-35a) and the opinion of the district court granting partial summary judgment in favor of respondents and partial summary judgment in favor of the government (Pet. App. 36a-57a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 2006. A petition for rehearing was denied on May 3, 2006 (Pet. App. 59a). The petition for a writ of certiorari was filed on August 1, 2006, and the petition was granted on December 1, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The standing principle recognized in *Flast* v. *Cohen*, 392 U.S. 83 (1968), rests firmly on one of the central purposes of the Establishment Clause: preventing government from using its taxing power to force citizens to provide financial support for religion. Moreover, as the Court recognized last Term in *DaimlerChrysler* v. *Cuno*, 126 S. Ct. 1854 (2006), *Flast*'s rationale fits comfortably with this Court's general standing jurisprudence. This Court most recently addressed the principle in *Bowen* v. *Kendrick*, 487 U.S. 605 (1989), unanimously rejecting an attempt by the government to narrow the doctrine on grounds virtually identical to those it advances here. The claim here is in all material respects identical to the claims permitted in *Flast* and *Kendrick*.

Although the government does not point to an increase in unjustified taxpayer claims under the Establishment Clause, it frames this case in cataclysmic terms, asserting that the holding below threatens to "establish[] the courts, at the behest of any one of the more than 180 million taxpayers in the United States, as a standing Council of Revision for every governmental encounter with religion" (Pet. Br. 47). It proposes restrictions on standing that would dramatically constrict current law – exempting *all* expenditures of discretionary funds and *every* expenditure other than grants to religious organizations – thereby precluding a broad range of taxpayer claims seeking redress for the precise injury that was at the heart of the Framers' concern about government support of religion.

The government's dire predictions rests on a misunderstanding of the claim in this case, the holding below, and current law. This case does not involve a challenge to every government official's ability to "speak favorably about religion or * * * meet with representatives of religious groups" (Pet. Br. 39). It involves, in the court of appeals' words, the claim that although petitioners assert that their conferences and other activities are designed "to promote community organizations whether secular or religious," "in fact the conferences are designed to promote religious community organizations over secular ones." Pet. App. 9a. The court of appeals' holding does not open the door to lawsuits challenging a particular speech; the court of appeals held that respondents had *no standing* to assert such a claim. *Id.* at 14a-15a.

Finally, the government ignores the existing limits on taxpayer standing that require the taxpayer to show that his injury – the challenged expenditure of federal funds – is fairly traceable to the conduct that allegedly violates the Establishment Clause. This familiar standing principle will screen out the attenuated claims that the government fears – if anyone chooses to bring them. There simply is no warrant

for the arbitrary, extraordinarily broad cut-back in taxpayer standing sought by the government here.

A. Background

1. Petitioners are the director of the White House Office of Faith-Based and Community Initiatives and the directors of similar Offices in the Departments of Justice, Labor, Education, Health and Human Services, Housing and Urban Development, and Agriculture and in the Agency for International Development ("FBCI Offices"). The White House FBCI Office was established by Executive Order in January 2001 and given "lead responsibility in the executive branch to establish policies, priorities, and objectives of the Federal Government's comprehensive effort to enlist, equip, enable, empower, and expand the work of faith-based and other community organizations to the extent permitted by law." Exec. Order No. 13,199, 3 C.F.R. § 2, at 752 (2002). The Executive Order identifies twelve "principal functions" to be carried out by the Office and states that the Office "shall have a staff to be headed by the Assistant to the President for Faith-Based and Community Initiatives" and "shall have such staff and other assistance to the extent permitted by law, as may be necessary to carry out the provisions of this order." *Id.* § 3, 4(b), at 753.

The Executive Orders establishing the FBCI Offices in the Departments and in the Agency for International Development similarly identify specific responsibilities for the Offices, state that each Office "shall be supervised by a Director, appointed by the department head" in consultation with the White House FBCI Office, and require the relevant agency to "provide its Center with appropriate staff, administrative support, and other resources to meet its responsibilities under this order." Exec. Order No. 13,198, 3 C.F.R. § 2(b), (c), at 750 (2002); Exec. Order No. 13,280, 3 C.F.R. § 2, at 263 (2003).

Nearly two years after establishing the first FBCI Offices, the President issued an Executive Order "to ensure equal protection of the laws for faith-based and community organizations." Exec. Order No. 13,279, 3 C.F.R. § 2, at 258 (2003). It bars discrimination on the basis of religion in the distribution of federal grants, prohibits grant recipients from discriminating on the basis of religion, requires organizations that engage in religious activities to separate those services in time and space from any programs supported with federal funds, and permits faith-based organizations to participate in federal grant programs "without impairing their independence, autonomy, expression, or religious character." *Id.* § 2(f), at 260.

A report issued by the White House in August 2001 – seven months after the first FBCI Offices were established – "summarize[d] the initial findings" by these Offices "on barriers impeding religious and grassroots organizations that seek to serve the common good in collaboration with the Federal Government." UNLEVEL PLAYING FIELD: BARRIERS TO PARTICIPATION BY FAITH-BASED AND COMMUNITY ORGANIZATIONS IN FEDERAL SOCIAL SERVICE PROGRAMS 1 (Aug. 2001), *available at* http://www.whitehouse.gov/news/releases/2001/08/20010816-3-report.pdf.

The report discussed available data regarding the percentage of federal grants to nonprofit organizations that were awarded to "community-based groups" and to "faith-based groups." Of the ten grant categories discussed in the report, seven listed only the percentage of grants awarded to faith-based organizations. *Id.* at 5-7.

The report went on to identify "barriers" preventing these groups from obtaining federal grants. For example, although recognizing that "some restrictions on how religious organizations can spend government grants are plainly required by the Constitution," the report condemned "excessive

restrictions" that "unnecessarily and improperly limit the participation of faith-based organizations." *Id.* at 13, 14.[1]

The Government Accountability Office in June 2006 issued a report on the activities of five FBCI Offices – those at the Departments of Health and Human Services, Education, Justice, Labor, and Housing and Urban Development. See GAO, FAITH-BASED AND COMMUNITY INITIATIVE (June 2006), *available at* www.gao.gov/new.items/d06616.pdf (hereinafter "GAO REPORT"). That report observed that the White House FBCI Office had collected and published data concerning awards of federal grants to faith-based organizations documenting a 38% increase in the number of grants and a 21% increase in funding between fiscal years 2003 and 2005. *Id.* at 43. The White House Office "has not reported on the participation of community-based organizations." *Id.* at 8.

2. The activities of the various FBCI Offices are funded through appropriations laws enacted by Congress. The GAO Report explained that these funds are obtained from different accounts established by the relevant Department's appropriation statute:

> Education's center receives its funding through the Office of the Secretary of Education and HUD's center receives its funding through HUD's salaries and expenses account, while Justice's and HHS's centers are funded through internal agencies such as the Office of Justice Programs in Justice and the Administration for Children and Families in HHS. Labor's center receives funds from both its agency's

[1] The report also criticized a program that improperly limited participation to faith-based groups. *Id.* at 22. Interestingly, ten pages of the report – fully two-thirds of the total discussion of specific "barriers" – are devoted to the particular barriers faced by faith-based organizations. *Id.* at 10-20.

> departmental management account and from program offices.

Id. at 21. "[A]lthough not required to, HHS has included information on funding for its [Office] as part of its congressional budget request for several years, while HUD and Labor have included similar information in past budget requests. These agencies have in turn received guidance from Congress in the past on the amount of resources to allocate to their [Offices]." *Ibid.*[2]

The FBCI Offices of five Departments – Justice, Education, Labor, HHS, and HUD – "estimated [for GAO] that they cumulatively spent more than $24 million on administrative activities related to the initiative" for fiscal years 2002-2005. *Id.* at 19-20. These estimates "do not include other federal initiative-related expenditures, such as the administrative costs associated with program offices' efforts to assist faith-based and community organizations." *Id.* at 21 (footnote omitted).

3. The Freedom From Religion Foundation, Inc., and several of its members – all of whom are respondents in this Court – commenced this action against petitioners and other government officials in June 2004 alleging several distinct violations of the Establishment Clause.

First, respondents alleged that petitioners organized conferences regarding federal grant programs that were intended to and had the effect of "preferentially promot[ing] and advocat[ing] a climate conducive to funding for faith-based organizations, without similar advocacy for secular community-based organizations." Pet. App. 76a (Amended Complaint ¶ 36). Petitioners' actions "endors[ed] a preference

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[2] The GAO further observed that "Education and Justice have provided limited or no information on their [Offices'] funding to Congress as part of their budget requests. In turn, these agencies have not received guidance from Congress on the amount of resources to allocate to their [Offices]." GAO REPORT at 21.

for the funding of faith-based organizations." *Id.* at 77a (¶ 40); see also *ibid.* (¶ 39) (petitioners "organize[d], set up and conduct[ed] such public events to advance funding for faith-based organizations"); *id.* at 79a (¶¶ 44 & 45). As the court of appeals explained, "[t]he stated goal of the conferences is to promote community organizations whether secular or religious," but "[t]he plaintiffs claim that in fact the conferences are designed to promote religious community organizations over secular ones." *Id. at* 9a.

The amended complaint cites several specific events as evidence of the alleged purpose and effect of the conferences, including speeches "tout[ing] the allegedly unique capacity of faith-based organizations to provide effective social services, including by singling out alleged exemplary stories and anecdotes, all of which focused on faith-based organizations, to the exclusion of other organizations" (Pet. App. 75a (¶ 34); and specific grants that were the result of "preferential[] fund[ing]" of faith-based organizations (*id.* at 78a (¶ 42)). See also *id.* at 10a (court of appeals concluded that the complaint "portrays the conferences organized by the various [Offices] as propaganda vehicles for religion").

Second, respondents identified eight instances in which federal grant recipients "directly and preferentially funded with Congressional taxpayer appropriations" used those funds for services that "integrate religion as a substantive and integral component" in violation of the Establishment Clause. Pet. App. 78a (¶ 42). One of these was a grant to MentorKids USA by the Department of Health and Human Services under the Mentoring Children of Prisoners grant program (see 42 U.S.C. § 629i).

Third, respondents alleged that the Secretary of Health and Human Services "funded intermediary faith-based organizations that preferentially award sub-grants to other faith-based organizations," citing the "funding for the Interfaith Health Program of Rollins School of Public Health at Emory University, under a Department of Health and Human

Services' Compassion Capital Grant, which grantee does not utilize objective criteria in making sub-awards." Pet. App. 79a (¶ 43). Respondents alleged that these grants violated the "principle of neutrality" mandated by the Establishment Clause. *Ibid.*

Respondents contended that they had standing to assert these claims based on the individual respondents' status as federal taxpayers (Pet. App. 68a-69a (¶¶ 7-9)) and the Foundation's status as a representative of its members who are federal taxpayers (*id.* at 68a (¶ 5)). They also alleged that all of the challenged activities were funded by appropriations enacted by Congress pursuant to its authority under Article I, Section 8 of the United States Constitution. *Id.* at 69a-72a (¶¶ 11-24), 73a (¶ 32), 76a (¶ 36), 77a (¶¶ 39 & 41), 78a-79a (¶¶ 42-44).

Respondents sought a declaratory judgment, an order enjoining the defendants from using appropriations in violation of the Establishment Clause, and an order requiring the defendants to establish rules to ensure that future appropriations were not used in violation of the Establishment Clause. Pet. App. 80a.

B. The District Court's Decisions.

The district court granted petitioners' motion to dismiss with respect to the claim involving the activities of the FBCI Offices. Pet. App. 27a-35a. It held that respondents' status as federal taxpayers did not give them standing to pursue this claim. The court reasoned that because the FBCI Offices are "funded * * * with general budget appropriations," they are not "charged with the administration of a congressional program. Consequently, [their] actions are not 'exercises of congressional power' as required by the *Flast* test." *Id.* at 33a, 34a; see also *id.* at 34a (respondents "do not have standing to challenge the actions of [petitioners] because their actions do not represent congressional power as required by the *Flast* test").

Subsequently, the district court granted partial summary judgment for the government and partial summary judgment for respondents with respect to the other claims. Pet. App. 36a-57a. As to the grant to Emory University by the Department of Health and Human Services under the Compassion Capital Fund program, the court held that there was no proof of alleged bias in selecting grantees or sub-grantees. *Id.* at 50a-55a.

With respect to the claim that MentorKids USA was using federal funds to promote religion, the court observed that "[c]onfronted with the evidence produced by [respondents] in their motion for summary judgment, [the government] acted on December 16, 2004 to suspend further funding" of the grant. Pet. App. 55a. "Effectively conceding that federal funds have been used by the MentorKids program to advance religion in violation of the Establishment Clause, [the government does] not attempt to set forth specific facts to show that there is a genuine issue for trial. Accordingly, [respondents] are entitled to judgment as a matter of law." *Id.* at 56a.[3]

C. The Court Of Appeals' Decision.

The court of appeals reversed the district court's holding that respondents lacked standing to challenge the activities of the FBCI Offices. Pet. App. 1a-26a. The court, speaking through Judge Posner, explained that "[t]he difference * * * between this case on the one hand and *Flast* and *Kendrick* on the other is that the expenditures in those cases were pursuant to specific congressional grant programs, while in this case

[3] Respondents did not pursue their claims with respect to other grants. Respondents voluntarily dismissed the claims against the director of the FBCI Office at the Corporation for National and Community Service. The district court dismissed respondents' claims against former Secretary of Education Rod Paige, and the court of appeals affirmed that determination. Pet. App. 14a-15a, 35a.

there is no statutory program, just the general 'program' of appropriating some money to executive-branch departments without strings attached. The difference cannot be controlling." *Id.* at 11a.

The court rejected the government's argument that taxpayers have standing only to challenge grants to third parties: "[t]he line proposed by the government * * * would be artificial because there is so much that executive officials could do to promote religion in ways forbidden by the establishment clause * * * without making outright grants to religious organizations. For the government to operate a mosque or other place of worship would not involve a grant unless a contractor was involved." Pet. App. 13a.

A taxpayer has standing to raise an Establishment Clause challenge to an expenditure, the court stated, if the funds in question are derived "from exercises of Congress's spending power." Pet. App. 11a. Here, "the objection is to a program for which money undoubtedly is 'appropriated,' albeit by executive officials from discretionary funds handed them by Congress, rather than by Congress directly." *Id.* at 12a.

The court of appeals observed that this Court in *Flast* "carved an exception [to taxpayer standing] for 'an incidental expenditure of tax funds in the administration of an essentially regulatory statute.'" Pet. App. 13a (quoting *Flast*, 392 U.S. at 102). Noting that "incidental" is "a relative term" whose meaning "depends on what it is deemed incidental to," the court concluded that incidental did not mean the size of the challenged expenditure compared to the overall federal budget or to the budget of a particular Department, but instead "should be reserved for such cases as that of the government's expenditure on an armored limousine to transport the President to the Capitol to deliver the State of the Union address in which he speaks favorably of religion." *Id. at* 14a.

Accordingly, the Court concluded, its analysis "would not permit an individual citizen to challenge just any action

of the executive with which he disagrees as a violation of the establishment clause." Pet. App. 14a. The plaintiff would have to show an expenditure of federal funds tied to the challenged activity – "[f]ederal employees employed in programs of unquestioned constitutionality cannot be sued by taxpayers simply because they divert some of their work to improper purposes" (*id.* at 15a) – and the expenditure may not be incidental. Here, because respondents challenged the FBCI program itself as unconstitutional, "the fact that it was funded out of general rather than earmarked appropriations – that it was an executive rather than a congressional program – does not deprive taxpayers of standing to challenge it. Taxpayers have standing to challenge an executive-branch program, alleged to promote religion, that is financed by a congressional appropriation, even if the program was created entirely within the executive branch, as by Presidential executive order." *Id.* at 16a.

Judge Ripple dissented. Pet. App. 16a-26a. He concluded that "*Flast* * * * remains necessary to allow challenges to situations in which Congress makes no public endorsement of religion but nevertheless supports a sectarian cause through the transfer of public funds" because of "the inherent difficulty in enforcing the specific prohibition of the Establishment Clause against the expenditure of government funds for the establishment of religion. Beneficiaries of such spending have no incentive to sue, and non-beneficiary outsiders cannot show a direct injury." *Id.* at 22a, 20a. He disagreed with the majority's conclusion that the *Flast* rule encompassed the claim in this case, however, asserting that it "makes virtually any action subject to taxpayer suit." *Id.* at 24a.

The full court of appeals denied the government's petition for rehearing en banc by a 7-4 vote. Pet. App. 58a-66a.

SUMMARY OF ARGUMENT

This Court in *Flast* recognized that one of the "specific evils" feared by the Framers of the Establishment Clause was that "the taxing and spending power would be used to favor one religion over another or to support religion in general." 392 U.S. at 103. That practice had been prevalent both in Europe and in the colonies, and the injury for which *Flast* permits redress is the injury that was at the core of the Framers' concern – the "'extract[ion] and spen[ding]' of 'tax money' in aid of religion." *DaimlerChrysler*, 126 S. Ct. at 1865 (quoting *Flast*, 392 U.S. at 106).

The claim permitted by *Flast* is unique in that the expenditure of government funds in violation of the Establishment Clause itself satisfies Article III's injury requirement But the presence of government funding alone is not enough to establish standing. The taxpayer must show a sufficiently close connection between the challenged expenditure and the conduct alleged to violate the Clause. This requirement of a sufficient causal connection arises in a myriad of contexts, and the general principle from the Court's standing jurisprudence – that the injury must be "fairly traceable" to the challenged conduct (*Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 590 (1992)) – supplies the guiding principle in this context as well.

Requiring an expenditure that is fairly traceable to the conduct violative of the Establishment Clause enables taxpayers to seek redress in situations in which there is a definite link between the expenditure of government funds and religion. At the same time, this requirement precludes claims in which that connection is attenuated and the government spending could not reasonably induce in a taxpayer the concern about compelled exaction of funds for religious purposes that was the focus of the Framers' attention. It also harmonizes the *Flast* inquiry with general standing principles and accommodates separation of powers concerns by precluding attenuated claims.

The government ignores this conventional standing principle and argues instead that the Court should impose arbitrary – and very substantial – limitations that would bar taxpayers from challenging expenditures at the core of the Framers' concern and that have no logical connection to Establishment Clause principles or general standing doctrine. It claims this dramatic step is necessary to avoid a flood of Establishment Clause challenges to "virtually everything" the executive branch does (Pet. Br. 30). In fact, the bar on attenuated claims grounded in general standing principles precludes the litigation torrent that the government fears. There is no warrant for the radical revision of *Flast* that the government seeks.

First, the government urges the Court to hold that taxpayers may challenge disbursements violative of the Establishment Clause if they allege "that *Congress* exceeded its taxing and spending authority in [some] respect" (Pet. Br. 25 (emphasis in original)). This Court rejected the identical argument in *Kendrick*, and should do so here as well. Indeed, *Flast* and *Kendrick* both involved challenges to discretionary spending decisions by the executive branch.

The government attempts to distinguish these precedents by arguing that discretionary expenditures pursuant to a congressional "program" are different from other discretionary disbursement decisions. But the injury to taxpayers in both situations is the very injury targeted by the Establishment Clause and *Flast* – the expenditure for the support of religion of funds exacted from taxpayers. And constricting taxpayer claims in this manner would produce an exclusion of staggering proportions, exempting a broad range of unconstitutional expenditures. Finally, the government's limitation makes no sense: a taxpayer cannot argue that the challenged expenditure violated limits imposed by Congress; he may raise only an Establishment Clause challenge. Requiring the existence of a congressional program is a purely arbitrary limitation on taxpayer standing that has nothing to do with the substantive

claims the taxpayer may assert. The government cannot point to a single case in which the Court has denied taxpayer standing on this basis.

The government's position is also sharply inconsistent with the history on which the *Flast* Court relied. Given their knowledge of English history, the Framers were well aware of the potential for abuse of executive power in the area of religion, which included coerced payment of funds that were used by the monarch to aid religion. There simply is no basis for concluding that they were *less* concerned about exercises of executive discretion than about the actions of Congress.

Second, the government proposes a new rule allowing taxpayers to challenge *only* disbursements of appropriated funds to third parties. All other expenditures would be immune from challenge by taxpayers. Again, however, the injury suffered by the taxpayer in both situations is the precise injury identified in *Flast*; it does not matter whether the government awards a grant for the purchase of religious materials or instead buys the materials and then distributes them. Again, the government's proposed rule would exempt a broad swath of unconstitutional expenditures.

The government's rule is also squarely inconsistent with the relevant history. Under the government's theory, Madison would have withdrawn his Remonstrance – and had no objection to the Virginia statute providing funds for the hiring of religion teachers – if only the statute had been drafted to make the teachers state employees rather than employees of the church. In fact, of course, it was the use of the government funds to which Madison objected, not the particulars of the employment relationship.

Flast rests firmly on the Framers' intentions and has been applied by this Court in a long line of decisions. Conventional standing principles establish limits that preclude the horribles hypothesized by the government. This Court should reject the government's invitation to reject its prece-

dents, and instead reaffirm the taxpayer standing principle together with the existing limitations on that principle.

ARGUMENT

RESPONDENTS HAVE STANDING AS FEDERAL TAXPAYERS TO CHALLENGE THE FAITH-BASED OFFICES' PROGRAM TO DIRECT MORE FEDERAL GRANTS TO RELIGIOUS ORGANIZATIONS.

The complaint alleges that the FBCI Offices spent appropriated funds to hold a series of conferences that – although assertedly neutral between religious and non-religious organizations – in fact were designed to give a preference to religious organizations with respect to awards of federal grants. To prevail on that claim, respondents will have to establish the relevant facts regarding the conferences as well as to demonstrate that the conferences did not constitute permissible outreach efforts.[4]

The issue before the Court is not the merits of respondents' claim – or even whether that claim is pled adequately

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[4] Respondents' claim is thus analogous to arguments raised in other contexts that programs framed as requiring only enhanced outreach to women and minorities by government entities or government contractors in connection with employment or contracting in fact are disguised preferences. Compare *Monterey Mech. Co.* v. *Wilson*, 125 F.3d 702 (9th Cir. 1997) (invalidating statute as impermissible preference), with *Monterey Mech. Co.* v. *Wilson*, 138 F.3d 1270 (9th Cir. 1998) (Reinhardt, J., joined by Pregerson and Tashima, JJ., dissenting from denial of rehearing en banc) (characterizing statute as good faith outreach effort); see also *MD/DC/DE Broadcasters Ass'n* v. *FCC*, 236 F.3d 13 (D.C. Cir. 2001) (affirmative outreach rule violated equal protection); *Safeco Ins. Co. of America* v. *City of White House*, 191 F.3d 675, 691 (6th Cir. 1999) (EPA minority contractor outreach requirements challenged as impermissible preference; government may not avoid strict scrutiny review simply "by invoking the phrase 'good-faith effort to solicit'").

in the complaint. It is whether respondents' status as federal taxpayers gives them standing to assert such a claim.

The Court has explained that "the irreducible constitutional minimum of standing contains three elements." *Lujan*, 504 U.S. at 560. First, the plaintiff must demonstrate "an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Ibid.* (citations, footnote, and internal quotation marks omitted). Second, the plaintiff must show "a causal connection between the injury and the conduct complained of – the injury has to be 'fairly * * * trace[able] to the challenged action of the defendant, and not * * * th[e] result [of] the independent action of some third party not before the court." *Ibid.* (alterations and omission in original) (quoting *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Finally, "it must be 'likely' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (quoting *Simon*, 426 U.S. at 38); see also *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103-04 (1998) ("triad of injury in fact, causation, and redressability comprises the core of Article III's case-or-controversy requirement").

In *Flast* v. *Cohen*, *supra*, this Court held that a taxpayer had standing to assert an Establishment Clause challenge to an expenditure of funds appropriated by Congress. Since *Flast*, the Court has repeatedly relied upon plaintiffs' status as state or federal taxpayers to justify reaching the merits of Establishment Clause claims. See, *e.g.*, *Hibbs* v. *Winn*, 542 U.S. 88, 94 (2004); *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 648 (2002); *Mitchell* v. *Helms*, 530 U.S. 793 (2000); *Agostini* v. *Felton*, 521 U.S. 203, 212 (1997); *Aguilar* v. *Felton*, 473 U.S. 402, 407 (1985); *Sch. Dist. of Grand Rapids* v. *Ball*, 473 U.S. 373, 380 (1985); *Mueller* v. *Allen*, 463 U.S. 388, 392 (1983); *Wolman* v. *Walter*, 433 U.S. 229, 232 (1977); *Roemer* v. *Bd. of Pub. Works*, 426 U.S. 736, 744 (1976); *Meek* v. *Pittenger*, 421 U.S. 349, 355 n.5 (1975);

Sloan v. *Lemon*, 413 U.S. 825, 826 (1973); *Comm. for Pub. Ed. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 762 (1973); *Hunt* v. *McNair*, 413 U.S. 734, 735 (1973); *Levitt* v. *Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 478 (1973); *Tilton* v. *Richardson*, 403 U.S. 672, 676 (1971).

The Court explained just last Term in *DaimlerChrysler Corp.* v. *Cuno*, 126 S. Ct. 1854 (2006), that a taxpayer's claim that an expenditure violates the Establishment Clause satisfies the first two elements of the standing test because the taxpayer's injury is "the very 'extract[ion] and spen[ding] of 'tax money' in aid of religion." 126 S. Ct. at 1865. That injury can be redressed by "an injunction against the spending," and therefore satisfies the third standing requirement discussed in *Lujan*. *Ibid.* See also pages 46-47, *infra*.

Flast identified two basic elements necessary to establish standing as a taxpayer. The taxpayer may "allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause" and must assert a challenge under the Establishment Clause. 392 U.S. at 102-03. The complaint here challenges expenditures of funds appropriated by Congress pursuant to its authority under Article I, section 8 of the Constitution and respondents claim that those funds were expended in violation of the Establishment Clause.

The presence of government funding alone is not sufficient to establish a taxpayer's standing to assert an Establishment Clause claim. The Court in *Flast* noted that "[i]t will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." *Id.* at 102. That was an expression of the principle – stated more generally in the causation element of *Lujan* – that there must be a "fairly traceable" link between the challenged conduct and the injury. A taxpayer accordingly must show that the challenged expenditures are fairly traceable to the conduct alleged to violate the Establishment Clause.

Essentially ignoring this limitation, the government asserts that the Court should adopt two new restrictions on the *Flast* principle – that a plaintiff must "allege that *Congress* exceeded its taxing and spending authority in [some] respect" (Pet. Br. 25 (emphasis in original)) and that the challenged expenditure involves only "the disbursement of funds to entities outside the government" (*id.* at 44).

The new restrictions sought by the government are not necessary to preclude Establishment Clause challenges to "virtually everything" the executive branch does (Pet. Br. 30) or any of the other horribles in the government's parade. There is no flood of Establishment Clause plaintiffs asserting novel theories of taxpayer standing engulfing the federal courts. The government's certiorari petition cites only two appellate decisions – one decided in 1978 and one decided in 1989 – involving claims under the Establishment Clause. Pet. App. 23a-24a.[5] The existing rules governing taxpayer standing already prevent the intrusion into executive prerogatives that the government fears, while maintaining taxpayers' ability to vindicate the critical guarantee of the First Amendment that taxpayer funds be used for religious purposes.

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[5] The government also cites *Public Citizen, Inc.* v. *Simon*, 539 F.2d 211 (D.C. Cir. 1976), which did not involve an Establishment Clause claim. The government references (Pet. Br. 48) the Seventh Circuit's decision in *Laskowski* v. *Spellings*, 443 F.3d 930, amended on reh'g, 456 F.3d 702 (2006), petition for cert. pending, No. 06-582. But that case presents no issue regarding taxpayer standing; the issue is the scope of relief available in actions brought by taxpayers. That issue could and would arise regardless of the Court's resolution of the question presented here.

A. To Maintain A Claim Under *Flast*, The Taxpayer Must Demonstrate That The Challenged Expenditure Is Fairly Traceable To The Alleged Unconstitutional Conduct.

Flast vindicates one of the core protections of our Constitution:

> Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. James Madison * * * observed in his famous Memorial and Remonstrance Against Religious Assessments that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."

392 U.S. at 103 (citation omitted). "A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches." *Everson* v. *Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 8 (1947).

Unfortunately, "[t]hese practices of the old world were transplanted to and began to thrive in the soil of the new America. [Charters granted by the Crown] * * * authorized * * * religious establishments which all, whether believers or non-believers, would be required to support and attend. * * * The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused [the colonists'] indignation. It was these feelings that found expression in the First Amendment." *Id.* at 9-11 (footnotes omitted).

The injury for which *Flast* permits redress is the injury that was at the core of the Framers' concern – the "'ex-

tract[ion] and spen[ding]' of 'tax money' in aid of religion." *DaimlerChrysler*, 126 S. Ct. at 1864 (quoting *Flast*, 392 U.S. at 106). The Court employs the "fairly traceable" standard in a variety of contexts to ensure a sufficiently close link between the injury and the challenged conduct, denying standing where the relationship is too attenuated. See, *e.g.*, *Allen* v. *Wright*, 468 U.S. 737 (1984); *Simon*, 426 U.S. at 41-42.

In the context of an Establishment Clause claim, the taxpayer must establish the necessary link between the unconstitutional conduct and the challenged expenditure. The "fairly traceable" standard determines whether that relationship is sufficient to support standing.[6]

A challenge to a grant, contract, or other award of federal funds to a third party on the ground that the recipient's use of the funds violates the Establishment Clause always will satisfy this standard, because an identifiable expenditure is clearly linked to the challenged conduct – it is the impermissible use of those particular funds that is the alleged violation. Indeed, this Court has routinely found standing to assert such claims. See pages 16-17, *supra*.

The same would be true of a challenge to a set of activities that are expressly denominated a program – whether by Congress or by an agency. The expenditures attributable to the program are clearly linked to the challenged activity. A claim that the government hired an employee to engage in impermissible activities suffices for the same reasons

In other situations, the facts may not be clear cut – there will be a question whether there is a sufficient relationship between the particular disbursements and the challenged activity. That issue is no different than causation questions that arise in a myriad of contexts.

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[6] We agree with the government (Pet. Br. 37) that the size of the expenditure is not the relevant consideration.

Requiring an expenditure that is fairly traceable to the conduct violative of the Establishment Clause enables taxpayers to seek redress in situations in which there is a definite link between the expenditure of government funds and religion. At the same time, this requirement precludes claims in which that connection is attenuated. In that situation, the government spending could not reasonably induce in a taxpayer the concern about compelled exaction of funds for religious purposes that was the focus of the Framers' attention.[7]

This existing standard screens out the situations imagined by the government in its parade of horribles. Thus, a taxpayer would not have standing to challenge the content of one particular speech, for example the State of the Union address, as an Establishment Clause violation because he would not be able to identify an expenditure fairly traceable to that conduct. Transportation costs or rental fees for a venue, even if identifiable, would be too attenuated from the challenged conduct – as the court of appeals observed in this case. Pet. App. 14a; cf. *Simon*, 426 U.S. at 41-42. The same analysis applies to meetings of government officials, or of foreign officials. There accordingly is no warrant for the Court to adopt the novel restrictions on taxpayer standing proposed by the government.[8]

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[7] That is the explanation for the result in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952), which involved a taxpayer challenge to a state law providing for the reading of the Old Testament in public schools at the opening of each day, an essentially regulatory statute. The Court cited the taxpayer's lack of a "direct and particular financial interest" in rejecting standing. *Id.* at 435.

[8] Where standing cannot be based on taxpayer status, individuals may suffer other types of injury sufficient to establish standing to assert an Establishment Clause claim. In *Van Orden* v. *Perry*, 545 U.S. 844, 125 S. Ct. 2854 (2005), for example, the Court reached the merits of the Establishment Clause issue based on the injury incurred by the plaintiff from encountering a Ten Commandments monument on visits to the state capitol grounds. *Id.* at 2858.

B. *Flast* And Its Progeny Recognize Taxpayer Standing To Challenge Discretionary Spending Decisions By The Executive Branch With Respect To Funds Appropriated By Congress.

The government first asserts that a taxpayer may maintain an Establishment Clause claim only when the claim targets a decision by Congress; taxpayers supposedly may not challenge on Establishment Clause grounds discretionary spending decisions by the executive branch. "Once an appropriations law, whether general or targeted, is passed by both Houses of Congress and signed into law by the President, implementation and execution of that law is Executive Branch action" (Pet. Br. 30) not subject to challenge by taxpayers under *Flast*, although the government gerrymanders an exemption to this principle if "there is [a] * * * congressional taxing and spending program under challenge" (*id.* at 32).

The government's suggested rule is directly contrary to this Court's decisions in *Flast* and *Kendrick*, finds no support in any decision of this Court, and is wholly inconsistent with the history of the Establishment Clause.

1. Flast *Itself Upheld Taxpayers' Standing To Challenge Discretionary Spending Decisions By The Executive Branch.*

Flast v. *Cohen* did not present a challenge to congressional action; rather, it involved a dispute over a discretionary decision by the executive branch regarding funds appropriated by Congress. As the *Flast* plaintiffs explained in their brief in this Court, the lawsuit "challeng[ed] the constitutionality * * * of certain expenditures made by the Department of Health, Education, and Welfare." Br. of Appellants, *Flast v. Cohen*, 392 U.S. 83 (1968) (No. 416), 1967 WL 113846, at *3 (hereinafter "*Flast* Appellants' Br.").

The case involved two programs under the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79

Stat. 27. Title I of the Act authorized financial assistance to local educational agencies for the education of low-income families, whereby federal funds were paid to state agencies, which, in turn, passed them along to local agencies. Title II of the Act authorized federal grants to states for the purchase of library resources, textbooks, and other instructional materials for elementary and secondary schools. The complaint alleged that grants of federal funds under these titles to the New York City Board of Education were being used to finance "instruction in reading, arithmetic and other subjects and for guidance in religious and sectarian schools" and "the purchase of textbooks and instructional and library materials for use in religious and sectarian schools." *Flast*, 392 U.S. at 87 (quoting the plaintiffs' complaint).

In their brief in this Court, the plaintiffs emphasized the limited nature of their claim:

> The plaintiffs do not challenge the constitutionality of the Elementary and Secondary Education Act of 1965. Paragraph 9 of the complaint states expressly that "There are many programs within the meaning of Title I of the Elementary and Secondary Education Act of 1965 which could practicably be instituted by local education agencies which would qualify them for the receipt of Federal funds under the Act but which would not violate the provisions of the Federal Constitution."

Flast Appellants' Br. at *4 (quoting plaintiffs' complaint). The government agreed. Br. of Appellee, *Flast v. Cohen*, 392 U.S. 83 (1968) (No. 416), 1968 WL 129299, at *13 (hereinafter "*Flast* Appellees' Br.") ("[t]he decision as to the details of how federal funds will be used – whether for programs in public facilities or in religious or sectarian facilities, for instance – is in no way controlled by the Act").

Thus, the claim before this Court was that executive branch officials had violated the Establishment Clause by ap-

proving the grants in question. The plaintiffs sought an injunction barring further approvals of such grants. *Flast* Appellants' Br. at 3.[9]

The facts of *Flast* thus demonstrate that the government is simply wrong in asserting that "[u]nder *Flast*, it is only when the congressional spending decision itself causes the alleged injury that the unique historic concern about Congress's abuse of its taxing and spending power to compel religious subsidization is implicated." Pet. Br. 27. The "congressional spending decision itself" did not cause any injury at all to the plaintiffs; the claim was based solely on the federal agency's discretionary decisions regarding the funds appropriated by Congress.[10]

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[9] The government recognized that the complaint alleged that federal officials had approved grants for programs in religious schools (*Flast* Appellees' Br. at *11 & n.4), but informed the Court that "*neither the appellees nor any other federal official participate*" in the decision regarding how Title I grants will be used (*id.* at 13 (emphasis in original)). Rather, "this decision is made by the local educational agency, it is not even reviewed by appellees or any other federal officer * * *. There is no project-by-project approval at the federal level" because the federal funds were awarded to the State, which then disbursed them to local educational agencies. *Ibid.* The government informed the Court that "[t]he situation with respect to Title II * * * appears to be the same." *Id.* at 19.

The Court rejected the argument that these facts precluded the plaintiffs' claim, concluding that in light of the executive branch officials' "broad powers of supervision over state participation" and the fact that "it is federal funds administered by [those officials] that finance the local programs" the Court could not "characterize such federal participation as 'remote.'" 392 U.S. at 90 n.3. That determination further supports the conclusion that *Flast* upheld standing to challenge executive officials' discretionary decisions, not congressional actions.

[10] The government argues (Pet. Br. 21) that the Court's holding that a three-judge court was properly convened in *Flast* shows that the plaintiffs' claim challenged the constitutionality of the statute

2. Kendrick *Rejected The Precise Argument Advanced By The Government Here.*

This Court's decision in *Bowen* v. *Kendrick* erases any doubt that a taxpayer may challenge the discretionary decisions of executive branch officials concerning funds appropriated by Congress. The case involved the Adolescent Family Life Act ("AFLA"), 95 Stat. 578, 42 U.S.C. § 300z *et seq.*, a program for providing grants to nonprofit and publicly funded organizations to provide services relating to adolescent sexuality and pregnancy. The Court rejected the taxpayers' claim that the statute on its face violated the Establishment Clause because it authorized grants to religious organizations. See 487 U.S. at 601-18.

The plaintiffs also asserted an as-applied challenge, contending that particular grants awarded to religious organizations by the Secretary of Health and Human Services violated the Establishment Clause. The government, in turn, raised precisely the same standing objection presented here. It contended that the *Kendrick* plaintiffs lacked "standing as federal taxpayers to challenge the statute as applied," reasoning as follows:

> Under this Court's decision in *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), appellees' as-applied challenge fails because it is not "'made to an exercise by Congress of its power un-

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and not the Executive Branch's administrative decisions. What the Court held was that the convening of the three-judge court was proper because *the complaint* included a challenge to the constitutionality of statute as an alternative claim to its challenge to the federal officials' decisions, allowing the plaintiffs to present both claims to the three-judge court. See 392 U.S. at 90-91. By the time the case reached this Court, however, that claim had been abandoned, as the plaintiffs themselves expressly stated in their brief in this Court. See page 23, *supra*.

> der Art. I, § 8, to spend for the general welfare'" (454 U.S. at 479, quoting *Flast* v. *Cohen*, 392 U.S. 83, 103 (1968)), but rather is made to decisions by the Secretary about how to spend appropriated funds. Just as the plaintiffs in *Valley Forge* lacked standing to challenge a "decision by HEW to transfer a parcel of federal property" (454 U.S. at 479 (footnote omitted)), so, too, do appellees lack standing to challenge the individual spending decision made by the Secretary in implementing the AFLA.

Br. of Appellant, *Bowen* v. *Kendrick*, 487 U.S. 605 (1988) (No. 87-253) 1988 WL 1031759, at *n.24.

The Court unanimously rejected this argument. 487 U.S. at 619-20; *id.* at 630 n.4 (Blackmun, J., joined by Brennan, Marshall & Stevens, JJ., dissenting) (agreeing with majority on taxpayer standing issue). Speaking through Chief Justice Rehnquist, the Court stated: "We do not think * * * that appellees' claim that AFLA funds are being used improperly by individual grantees is any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary." 487 U.S. at 619.

The Court observed: "*Flast* itself was a suit against the Secretary of HEW, who had been given the authority under the challenged statute to administer the spending program that Congress had created. In subsequent cases, most notably *Tilton*, we have not questioned the standing of taxpayer plaintiffs to raise Establishment Clause challenges, *even when their claims raised questions about the administratively made grants*." *Ibid.* (emphasis added; citations omitted).[11]

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[11] The government points out (Pet. Br. 32) that "[t]he explicit decision to permit funds to be disbursed to religious groups was Congress's, not the Executive's," apparently intimating that this somehow is relevant to the standing issue. But this Court determined that Congress's directives did *not* violate the Establishment

In finding "a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power, notwithstanding the role the Secretary plays in administering the statute" (487 U.S. at 620), the Court decisively rejected the government's view that only challenges to congressional action are cognizable under *Flast*. Indeed, the *Kendrick* Court made clear that taxpayers may challenge administrative decisions regarding the spending of funds appropriated by Congress even though such a claim does not call into question any decision made by Congress.[12]

3. *The Discretion Exercised By The Executive Branch With Respect To Spending Decisions Not Tied To A Congressional Program Is Indistinguishable From The Discretion Involved In The Challenged Decisions In* Flast *And* Kendrick.

The government asserts that the critical element in *Flast* and *Kendrick* was that "the agency disbursed funds at *Congress's* behest pursuant to a *congressional* taxing and spending program" (Pet. Br. 31 (emphasis in original)) and thus

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Clause, yet it found that taxpayers still could raise challenges to the disbursement decisions of agency officials. The statutory language to which the government points had nothing to do with the Court's standing decision. That is confirmed by the fact that the Court reached the same conclusion regarding standing in *Flast*, which involved a statute that did not contain any express authorization of grants to religious organizations. See pages 22-23, *supra*.

[12] This Court has reached the merits in other cases in which the decision challenged under the Establishment Clause was not made by a legislature. See, *e.g.*, *Mitchell* v. *Helms*, 530 U.S. 793 (2000) (no facial challenge to federal statute, claim limited to single grantee's use of funds awarded under the statutory program). And it rejected an argument similar to the one advanced in *Kendrick* in *School District of Grand Rapids* v. *Ball*, 473 U.S. 373, 380 n.5 (1985)

those cases are inapposite here. But nothing in the Court's analysis supports the assertion that simply because those cases happened to involve grant programs established by Congress the *Flast* rule is restricted to that setting. To the contrary, the limitation proposed by the government is wholly inconsistent with the Court's reasoning in those cases.

a. ***The government's test would preclude taxpayers from challenging a broad range of expenditures that inflict the precise injury that the Framers sought to prevent.***

From the taxpayer's point of view, it does not matter whether funds are disbursed pursuant to an express command of Congress, a congressionally designed grant program, a grant program designed entirely by an agency, a contract for services, or as salary payments to a government employee. In each situation, the expenditure of the funds in violation of the Establishment Clause produces precisely the same injury. The "'extract[ion] and spen[ding]' of 'tax money' in aid of religion" (*DaimlerChrysler*, 126 S. Ct. at 1864 (citation omitted)) occurs whenever the government spends funds appropriated by Congress under Article I, section 8, regardless of which branch makes the decision that allegedly violates the Establishment Clause.

The government's position might make sense if the substantive restrictions imposed by the Establishment Clause applied only to Congress. But there is no doubt that the First Amendment applies fully to the activities of the executive branch. See, *e.g.*, *New York Times Co.* v. *United States*, 403 U.S. 713, 716 (1971) (Black, J., concurring) ("[t]he Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly").

Moreover, the breadth of the exclusion proposed by the government is staggering:

- If instead of the grants for textbooks at issue in *Flast*, the Department of Education purchased books using appropriated funds from a discretionary account and gave the books only to religious schools, taxpayers would not have standing to challenge that use of government funds.
- An agency could decide to use its discretionary funds to make bulk purchases of one particular religious symbol – Jewish stars, or crucifixes, or depictions of the star and crescent – for use in its offices or for distribution to employees or to the general public. Because discretionary funds were used, taxpayers could not challenge the expenditure.
- An agency could establish a chaplain's office, hiring clergy of only one denomination whose job it would be to hold meetings around the country to spread their faith. As long as the positions were created administratively and funded out of discretionary funds – as were the Faith-Based Offices here – the government's theory would preclude taxpayer standing.
- Rather than sponsoring conferences to discuss the federal grant process, agencies could fund a series of conferences around the country featuring clergy from one denomination and expressly billed as an effort to attract adherents to that religion. As long as discretionary funds were used, taxpayers would not be able to challenge that program.
- The Department of Education could decide to use its discretionary funds to fund contracts for development of school curricula. One of the contracts could be for religious education curricula designed to convince children – or adults – to

join one particular faith. If Congress had enacted a curriculum development grant program, the government would acknowledge taxpayer standing to challenge the award of such a grant. But if the program were formulated by the Secretary and funded out of discretionary accounts – or the contract in question were awarded on a one-off basis and not as part of a program – no challenge would be permissible.

- An agency could decide to award a contract for cleaning services only to a contractor that hired employees who believe in a Supreme Being. Under the government's theory, the disbursements under such a contract could not be challenged under *Flast*.
- Or, as the court of appeals observed (Pet. App. 11a-12a), an agency could use its discretionary funds to finance construction of a house of worship for a particular faith and taxpayers would not be able to challenge the expenditure.

Given the large amounts of money included in discretionary accounts,[13] as well as the ability of agency heads to transfer amounts from other accounts, as was done here (see pages 5-6, *supra*), the government's exception would bar standing to challenge a quite substantial category of expenditures impos-

[13] "For fiscal year 1905, for example, Congress appropriated to the Department of Justice a specific line item of $3,000 for stationery. Legislative, Executive and Judicial Appropriations Act, 1905, ch. 716, 33 Stat. 85, 134 (Mar. 18, 1904). For fiscal year 2005, Congress appropriated to the Department of Justice a lump-sum appropriation of $124,100,000 for administrative expenses. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2005, Pub. L. No. 108-447, div. B, title I, 118 Stat. 2853 (Dec. 8, 2004)." GAO, 2 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, at 6-5 n.2 (3d ed. Feb. 2006), *available at* http://www.gao.gov/special.pubs/d06382sp.pdf.

ing the very same injury described in *Flast*. This Court should reject such a radical change.

b. ***The existence of a congressional "program" is irrelevant to the taxpayer's substantive claim.***

The government's proposed narrowing of *Flast* makes no sense because there is no logical connection between its requirement of a congressional program and the nature of the claim that a taxpayer may assert. A *Flast* claim permits a taxpayer to challenge the disbursement of funds only under the Establishment Clause. *Flast*, 392 U.S. at 102-03 ("the taxpayer must show that the challenged enactment exceeds *specific constitutional limitations* imposed upon the exercise of the congressional taxing and spending power") (emphasis added). *Congressional* limitations on the expenditure of funds cannot be raised by the taxpayer. Requiring the existence of a congressional program is therefore a purely arbitrary limitation on taxpayer standing that has nothing to do with the substantive claims the taxpayer may assert.

c. ***The government's "program" test is standardless.***

The government's test – the existence of a "congressional program" – has no substantive content. The government makes no effort to define what is needed to establish a "program"? One congressional specification? Five? The fiscal year 2002 appropriation act for the Department of Health and Human Services included the following statement regarding funds for the Compassion Capital Fund grant program at issue in the district court: "a compassion capital fund to provide grants to charitable organizations to emulate model social service programs and to encourage research on the best practices of social service organizations." Pub. L. No. 107-116, 115 Stat. 2177, 2196. Is that enough to constitute a "program" (the government did not dispute respondents' standing to challenge a grant under this program on

the ground at issue here)? The government's proposed test is extremely unclear, in addition to bearing no relation whatever to the claim that the taxpayer asserts.

Moreover, the absence of specific statutory standards relating to a particular appropriation does not mean that Congress has imposed no restrictions upon the disbursement of those funds. There are numerous general statutes governing expenditure of those funds that restrict the discretion of the agency in question.[14] If Congress has not enacted specific limitations applicable to a particular appropriation, it necessarily has determined that the funds may be expended at the discretion of the relevant official subject to these generally-applicable rules. That action by Congress should be sufficient to satisfy the government's standard.

d. **Flast *requires a congressional appropriation, not a congressional program.***

The government at one point asserts that respondents "do not challenge any specific congressional action or appropriation, and respondents do not ask the Court to invalidate any Act of Congress, on its face or as applied" (Pet. Br. 25). Respondents certainly do challenge specific congressional appropriations. The Amended Complaint singles out the "Congressional budget appropriations, made pursuant to Article I, section 8" (Pet. App. 73a (¶ 32) & 76a (¶ 36)) as well as disbursement decisions regarding those appropriations (*id.* at 77a (¶ 41)).

Certainly there is no requirement that a taxpayer assert a facial challenge to a federal statute in order to maintain an Establishment Clause claim. There was no such claim before

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[14] See, *e.g.*, GAO, 1 PRINCIPLES OF FEDERAL APPROPRIATIONS, at 3-44 (3d ed. 2004) ("federal laws of general applicability" remain applicable to disbursements from discretionary accounts unless Congress expressly directs otherwise), *available at* http://www.gao.gov/special.pubs/d04261sp.pdf.

this Court in *Flast*, and this Court in *Kendrick* permitted the as-applied challenges to proceed notwithstanding its rejection of the facial challenge to the AFLA's constitutionality.

To the extent *Flast* requires the taxpayer to identify the particular statute that is challenged, such a requirement logically would focus on the relevant appropriations statute, because that is the law enacted pursuant to Article I, section 8 that permits the spending that is the source of the taxpayer's injury. The *Flast* Court adverted to the appropriations statute. 392 U.S. at 103 n.23. And those are the laws that respondents identified here.[15]

Indeed, the language in *Flast* on which the government relies – referring to "the type of legislative enactment attacked" and the requirement that the taxpayer show "that the challenged enactment" exceeds limitations on "the exercise of the congressional taxing and spending power" (Pet. Br. 31a) – could only mean the appropriations law, because the plaintiffs in *Flast* did not challenge the constitutionality of the authorizing statute (the Elementary and Secondary Education Act) before this Court. See page 23, *supra*. By requiring a taxpayer to "show that *the challenged enactment*

[15] Contrary to the government's assertion (Pet. Br. 30), this does not render the requirement meaningless – it ensures that the injury identified by the taxpayer indeed flows from the spending of taxpayer funds. Some government functions are self-funding, based on fees or other receipts. The classic example, of course, is the Postal Service – which, with the exception of franked mail and similar special circumstances, see, *e.g.*, 39 U.S.C. § 2401(b)-(d), must be supported entirely by fees received for postal services. See 39 U.S.C. §§ 2401(a), 3621; see also United States Postal Service, 2005 ANNUAL REPORT, at 30, *available at* www.usps.com/history/anrpt05/usps_ar05.pdf ("[a]s an independent establishment of the executive branch of the United States government, we receive no tax dollars for our operations. We are self supporting, and have not received a public service appropriation since 1982")

exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power" and noting that the Establishment Clause "operates as a specific constitutional limitation upon the exercise by Congress of the *taxing and spending power conferred by Art. I, § 8*" (392 U.S. at 102-03, 104 (emphasis added)), the Court made clear that the appropriations statute was the statute to which it referred.

The government's attempt to limit *Flast* to expenditures pursuant to a "program" established by Congress is thus directly contrary to the rationale of *Flast*, as explained just last Term in *DaimlerChrysler*; is wholly illogical and unclear; and is inconsistent with the language and analysis that the Court employed in *Flast*. This Court should reject this unjustified argument, as it did when the defendants presented the very same contention in *Kendrick*.[16]

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[16] The government asserts (Pet. Br. 30) that "Congress's taxing and spending power is not self-perpetuating after an appropriation is made," but rather "ends when the funds are appropriated – that is, when the funds are delivered into the control of the Executive Branch." That contention proves too much. If it were true, statutory restrictions on the disbursement of appropriated funds – whether contained in the appropriations act or in other laws enacted by Congress – would be inapplicable as soon as an appropriations act is signed by the President. Surely that is not the government's position. An appropriation is "[a]n authorization by an act of the Congress that permits Federal agencies to incur obligations and to make payments out of the Treasury for specified purposes." *Andrus* v. *Sierra Club*, 442 U.S. 347, 361 n.18 (1979) (quoting Comptroller General of the United States, TERMS USED IN THE BUDGETARY PROCESS 4 (1977)).

4. *The Other Decisions Relied Upon By The Government Provide No Support For Prohibiting Taxpayer Challenges To Discretionary Spending Decisions By The Executive Branch.*

The government cannot identify a single case in which this Court held that a taxpayer could not assert an Establishment Clause claim because the suit challenged a decision by the executive branch – and not by Congress – regarding the disbursement of appropriated funds. Much of the government's arguments consists of selected quotations from – and references to – three cases: *United States* v. *Richardson*, 418 U.S. 166 (1974); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974); and *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). Neither the holdings nor the rationales of these decisions support the government's proposed rule. None denied standing based on the absence of a spending "program" enacted by Congress; each held that the plaintiffs lacked standing as taxpayers because their claimed injury bore no relation to their status as taxpayers.

Richardson involved a taxpayer's claim that the accounting procedures employed by the Central Intelligence Agency violated Article I, section 9, clause 7 of the Constitution, which provides that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." The plaintiff's alleged injury was his inability to "obtain a document that sets out the expenditures and receipts" of the CIA. 418 U.S. at 169.

This Court concluded that the plaintiff's claim was "not addressed to the taxing or spending power, but to the statutes regulating the CIA." *Id.* at 175. Although the suit was a challenge to congressional action pursuant to Article I, it made "no claim that appropriated funds [were] being spent in violation of a 'specific constitutional limitation upon the * * * taxing and spending power.'" *Ibid.* (omission in original) (quoting *Flast*, 392 U.S. at 104). Because the challenged

conduct was not the expenditure of appropriated funds – but rather the failure to provide reports – the taxpayer failed to establish the required "'logical nexus' between the asserted status of taxpayer and the claimed failure of the Congress to require the Executive to supply a more detailed report of the expenditures of that agency." *Ibid.*

The complaint in *Schlesinger* asserted that the Incompatibility Clause of Article I, section 6 of the Constitution barred members of Congress from holding a commission in the Armed Forces during their tenure in office. The plaintiffs alleged that these Members were subject to "inconsistent obligations" and "undue influence by the Executive Branch," which deprived the plaintiffs "'of the faithful discharge by members of Congress who are members of the Reserves of their duties as members of Congress, to which all citizens and taxpayers are entitled.'" 418 U.S. at 212 (quoting plaintiffs' complaint).

The government argued in that case that "[b]y no stretch of the imagination can the situation complained of, the presence of congressmen in the reserves, be called congressional action under the taxing and spending clause." Br. of Petitioners, *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (No. 72-1188), 1973 WL 183884, at *23. This Court agreed, rejecting standing because the plaintiffs' injury did not stem from the disbursement of federal funds and therefore bore no "logical nexus" to plaintiffs' status as taxpayers. 418 U.S. at 227-28.[17]

The plaintiffs in *Valley Forge* alleged that a transfer of property by the Secretary of Health, Education, and Welfare

[17] The Court noted that the plaintiffs sought an order compelling the government to seek the return of pay received by the Members of Congress who also were reservists. 418 U.S. at 228 n.17. But that relief was sought as a consequence of prevailing on the merits; it was not the injury for which the plaintiffs sought redress. *Id.* at 212 (discussing injury claimed by the plaintiffs).

to a religious college violated the Establishment Clause. The Court held that that plaintiffs failed to demonstrate the nexus required by *Flast* because the property transfer "was not an exercise of authority conferred by the Taxing and Spending Clause of Art. I, § 8." 454 U.S. at 480. The problem, as the Court saw it, was that "[t]he authorizing legislation, the Federal Property and Administrative Services Act of 1949, was an evident exercise of Congress' power under the Property Clause, Art. IV, § 3, cl. 2." *Ibid.* This undisputed fact "[was] decisive of any claim of taxpayer standing under the *Flast* precedent." *Ibid.*; see Br. of Petitioners, *Valley Forge Christian Coll.* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) (No. 80-327), 1981 WL 390380, at *10 (government arguing that the fatal flaw in the plaintiffs' assertion of taxpayer standing was that "unlike *Flast*, the complained of activity finds its constitutional genesis in the Property Clause").

The Court also stated that "the source of [the plaintiffs'] complaint is not a congressional action, but a decision by HEW to transfer a parcel of federal property" (454 U.S. at 479), and the government asserts (Pet. Br. 28) that this observation supports its requirement of a congressional "program." That is the precise argument that this Court rejected unanimously in *Kendrick*, explaining that the plaintiffs' claim was not "any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary." 487 U.S. at 619.

The government also argues that the claim in *Valley Forge* could have been reframed as a challenge to the expenditure of appropriated funds: the "federal funds [that] paid the salaries of federal officials while they processed applications for property." Pet. Br. 27. But such a claim would have failed because such expenditures would not have been

"fairly traceable" to the challenged conduct and therefore could not support taxpayer standing under *Flast*.[18]

The absence of any authority from this Court that supports the government's proposed restriction confirms that the restriction should be rejected.

5. *The History Of The Establishment Clause Demonstrates That Its Framers' Concerns Encompassed All Government Spending In Support Of Religion.*

The Court in *Flast* relied heavily on the Establishment Clause's history in concluding that taxpayers suffer a judicially cognizable injury from expenditures of federal funds violative of the Clause. The "specific evil" feared by the Framers "was that the taxing and spending power would be used to favor one religion over another or to support religion in general." 392 U.S. at 103. "The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general." *Id.* at 103-04.

Seizing upon the statement in the next sentence of the *Flast* opinion that the Clause "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, 8" (*id.* at 104), the government contends that the Framers' concern was limited to "legislatively directed grants in aid of religion" (Pet. Br. 19). Nothing in the relevant history supports that assertion.

To begin with, *Flast*'s reference to "the exercise by Congress of the taxing and spending power" does not mean that standing exists only if the disbursement decision viola-

[18] The government's characterization of *Doremus* (Pet. Br. 29) is wrong for the same reason. The defect there was not the absence of a "separate tax" or "particular appropriation"; it was the absence of a separate *expenditure* that was not incidental to an essentially regulatory statute. 342 U.S. at 434.

tive of the Establishment Clause was made by Congress. As we have discussed, that was not true in *Flast* itself. See pages 22-24, *supra*. Rather, the statement reinforces *Flast*'s requirement that the taxpayer's challenge must be directed to an expenditure of federal funds *authorized by Congress pursuant to its spending power*, as opposed to an enactment pursuant to another of Congress's legislative powers, because the substantive limitation applies to the spending power. See pages 28-31, *supra*. And the *Flast* Court itself recognized that the Framers' concern was use of "government" – not "congressional" – powers (392 U.S. at 105-06) to expend in support of religion funds exacted pursuant to the taxing power.

The government points to nothing in the historical record supporting its claim that congressional decisions were the sole concern of the Framers of the Establishment Clause. And any such argument would be undercut by this Court's decisions making clear that the Establishment Clause applies to the executive branch as well as to Congress.

Given their knowledge of English history, moreover, the Framers were well aware of the potential for abuse of executive power, especially in the area of religion.[19] The history of the monarchy was replete with examples of establishment of particular denominations.[20] Some of these situations involved coerced payments of funds that then were used by the monarch to aid a particular religion. It is impossible to be-

[19] See, *e.g.*, Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385, 1419-20 (2004); Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. Rev. 1099, 1141 (2004).

[20] The monarch established and maintained substantial influence on the Church of England. See Esbeck, *supra* note 24, at 1404-05. For example, the monarch had the final say on doctrinal issues and was vested with the authority to select bishops. See 1 William Blackstone, COMMENTARIES *269, *365-69.

lieve that individuals knowledgeable about this history would have had *fewer* concerns about establishments of religion by the executive branch.

Thomas Jefferson certainly understood the Clause to limit executive authority. Describing the Clause's effect on the executive branch, he stated that "civil powers alone have been given to the President of the United States, and no authority to direct the religious exercises of his constituents." Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808), *in* THOMAS JEFFERSON: WRITINGS 1186-87 (Merrill D. Peterson ed., 1994). Also relevant is the bill that Jefferson drafted, and the Virginia Legislature enacted, in place of the measure to support religious teachers that was the target of Madison's Remonstrance: Jefferson's bill, which guaranteed religious freedom, targeted in its preamble "the impious presumption of legislators *and rulers*, civil as well as ecclesiastical, who * * * hath established and maintained false religions over the greatest part of the world." Thomas Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), *in* 2 PAPERS OF THOMAS JEFFERSON 305 (Julian P. Boyd et al. eds., 1950) (emphasis added). In Jefferson's view, "the *government* of the United States [is] interdicted by the Constitution from intermeddling with religious institutions. * * * Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government." Letter from Thomas Jefferson to Rev. Samuel Miller, *supra* (emphasis added).

President Madison shared Jefferson's view that, as chief executive, he was bound to discharge his duties in a manner consistent with the Establishment Clause. In 1811, Madison returned to the House of Representatives a bill that had been passed by both houses of Congress and transmitted for his signature, entitled, "An act incorporating the Protestant Episcopal Church in the town of Alexandria, in the District of Columbia." 5 THE FOUNDERS' CONSTITUTION 99 (Philip B. Kurland & Ralph Lerner eds., 1987). Madison sent a state-

ment indicating that he declined to sign the bill because it "exceeds the rightful authority to which *Governments* are limited, by the essential distinction between civil and religious functions," and specifically, that it violated the Establishment Clause. *Ibid.* (emphasis added).

To the extent the Framers' statements focus on abuses by Congress, it is because they viewed the executive as by far the weaker branch. Thus, Madison stated that "in our Government it is, perhaps, less necessary to guard against the abuse in the Executive Department than any other, because it is not the stronger branch of the system, but the weaker," although he made clear that the prohibitions of the Clause extended to both. 1 ANNALS OF CONGRESS, 454 (Joseph Gales ed., 1789).

The Framers' focus on Congress is especially understandable in the area of spending. The Constitution gave Congress the "power of the purse," which Madison described as "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." THE FEDERALIST NO. 58, at 359 (Rossiter ed., 1961). In fact, Madison viewed the vesting of the appropriation power in Congress as "the great bulwark which our Constitution had carefully and jealously established against Executive usurpations." 3 ANNALS OF CONGRESS 938 (1793).

Early appropriations laws left no room for the exercise of executive discretion. Thus, a bill passed on March 14, 1794, appropriated one thousand two hundred dollars "[f]or wood and candles in the several offices of the treasury department (except the Treasurer's office)," and two thousand dollars "[f]or the expenses of stationery, printing and other contingent expenses" in the office of the Register of the Treasury. 3 Cong. Ch. 6, 1 Stat. 342 (1794). That same bill provided simply "[f]or the compensations granted by law to

the President and Vice President of the United States, thirty thousand dollars." *Ibid.*

The Framers simply could not have anticipated an appropriations bill allocating $53,830,000 "to be available for allocation within the Executive Office of the President" (Pub. L. No. 109-115, 119 Stat. 2396, 2472 (2005)) and leaving entirely to the President the decisions about disbursing the funds, subject to limits imposed by generally-applicable laws. They believed such decisions would fall solely within the province of Congress.

For the Framers, therefore, to express concern about Congress's decisions regarding disbursement of federal funds was to express that concern about *all* such disbursement decisions, because the Framers did not believe that any discretionary decisions would be made by the executive branch. Now that the executive branch is exercising some of the discretion previously confined to Congress, the only interpretation faithful to the original meaning of these statements – to capture all discretionary disbursement decisions – is to treat discretionary decisions by the executive branch in the same manner as discretionary decisions by Congress: as a basis for taxpayer standing as long as other applicable requirements are satisfied.

C. Taxpayers' Standing To Assert Establishment Clause Challenges Is Not Restricted To Grants Of Government Funds To Third Parties.

The government also suggests that this Court adopt a new rule allowing taxpayers to challenge *only* disbursements to third parties. Pet. Br. 44. All other expenditures of appropriated funds would be immune from challenge by taxpayers under the Establishment Clause.

There simply is no basis for limiting taxpayer standing to grants to third parties. Other expenditures of government funds impose the very same injury – the "'extract[ion] and spen[ding]' of 'tax money' in aid of religion" (*Daimler-*

Chrysler, 126 S. Ct. at 1865) – and have been held to support taxpayer standing. Thus, this Court has recognized that the expenditure of government funds for a chaplain's salary gives rise to taxpayer standing to challenge that disbursement as a violation of the Establishment Clause. *Marsh* v. *Chambers*, 463 U.S. 783, 786 n.4 (1983); see also *Katcoff* v. Marsh, 755 F.2d 223 (2d Cir. 1985) (military chaplain). Most of the examples above that discuss discretionary expenditures (at 21) do not involve grants to religious organizations and would therefore be excluded under the government's rule even though they impose the precise injury targeted in *Flast*.[21]

As with the government's proposed congressional "program" requirement, moreover, this restriction bears no relationship to the principle underlying *Flast*. Indeed, the government's approach turns the concept of injury identified in *Flast* on its head, prohibiting standing to challenge direct expenditures by government supporting religion, while permitting standing to challenge expenditures of government funds that are filtered through third parties. Plainly the direct expenditures are an equal – or even greater – intrusion on the values protected by the Establishment Clause.

The government relies on history to argue that the sole concern of the Framers of the Establishment Clause was "the provision of funds to churches or other institutions outside the government to subsidize their own religious exercise" (Pet. Br. 39). That contention is plainly wrong.

The government's entire argument is based on a false choice: between a view of the motivating purpose of the Establishment Clause as preventing government officials from "speak[ing] favorably about religion or [from] * * * meet[ing] with representatives of religious groups" (Pet. Br. 39), or as "the fear that Congress would use its power forci-

[21] The Court in *Marsh* observed that the plaintiff also had standing as a legislator. 463 U.S. at 786 n.4.

bly to transfer funds from taxpayers into the coffers of churches or other institutions" external to the government that then would be used for religious activities (*id.* at 41). Respondents do not espouse the government's straw man position – that the motivating purpose of the Clause was to limit officials' statements about religion. The government's discussion (Pet. Br. 39-41) of the Framers' religious beliefs and the invocation of God in proclamations and speeches is therefore wholly irrelevant.

The real question before the Court is whether the Framers were concerned generally about the use for religious purposes of funds exacted from taxpayers; or whether their concern was limited to grants to churches and other non-governmental institutions, leaving the government free to use taxpayer funds itself to establish religion.

None of the government's historical evidence supports its assertion that Framers' concern was limited to grants to churches. References to paying ministers' salaries, or building and maintaining churches, or maintaining a particular religion (Pet. Br. 41 nn. 14 & 15) do not help the government, because each of these goals can be accomplished by direct government expenditures as well as by grants to outside entities. Thus, the executive could itself build a church and make the facility available to a chosen religion; the government could put clergy of a particular denomination on its payroll.

Moreover, the Framers were well aware of the dangers that could result from linkage between the executive branch and religion. They were quite familiar with the Church of England, headed by the King. Since the Framers knew that Church and State could literally be commingled, and did not indicate any intent to exclude that situation from the Clause's reach – indeed, it was one of the principal reasons for the Clause – the only possible conclusion is that the Framers intended to reach all expenditures of taxpayer funds that violate the Clause's prohibition. See also pages 39-42, *supra*.

Nothing in the materials cited by the government provides the slightest hint that some government actions were exempt from the Framers' concern about use of public funds. Under the government's theory, Madison would have withdrawn his Remonstrance – and had no objection to the Virginia statute providing funds for the hiring of religion teachers – if only the statute had been drafted to make the teachers state employees rather than employees of the church. In fact, of course, it was the use of the government funds to which Madison objected, not the particulars of the employment relationship. There simply is no basis for prohibiting taxpayers from challenging such core violations, violations that impose the precisely same injury – "forc[ing] a citizen to contribute * * * for the support of any one establishment" – as a grant of funds to a church for religious purposes. *DaimlerChrysler*, 126 S. Ct. at 1864.

Finally, the government's approach would elevate form over substance, and allow the government to preclude taxpayer claims by internalizing activities that support religion. The example discussed earlier with respect to grants for curricula development discussed above (see pages 29-30, *supra*) shows how. If the Department of Education issued a grant or contract to a third party for development of the curricula, the government's proposed rule would permit a taxpayer challenge. But if the Department instead gave the task to a newly established office for religious curricula development and hired employees especially for that office, taxpayer standing would be barred. That distinction makes no sense.[22]

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[22] The government also cites (Pet. Br. 18-19) Justice O'Connor's concurring opinion in *Mitchell* v. *Helms* as support for its focus on grants to third parties. But just after the passage quoted by the government, Justice O'Connor cited the following statement from the Court's decision in *Walz* v. *Tax Commission*, 397 U.S. 664, 668 (1970): "[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign

D. The Government's Proposed Restrictions Are Not Justified By General Standing Principles Or Separation Of Powers Concerns.

Underlying the government's two proposed restrictions are its repeated assertions that further limitations on the *Flast* principle are necessary to ensure conformity with general standing doctrine and to prevent intrusion on separation of powers interests. Of course, these assertions ignore the existing limits on taxpayer standing, and the fact that those standards already address these concerns. See pages 19-21, *supra*. Further restrictions are not necessary.

1. Flast *Is Entirely Consistent With General Standing Principles.*

This Court in *DaimlerChrysler* explained that *Flast* is fully compatible with general standing principles:

> The *Flast* Court discerned in the history of the Establishment Clause 'the specific evils feared by [its drafters] that the taxing and spending power would be used to favor one religion over another or to support religion in general.' The Court therefore understood the 'injury' alleged in the Establishment Clause challenges to federal spending to be the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion alleged by a plaintiff. And an injunction against the spending would of course redress *that* injury, regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally.

126 S. Ct. at 1865 (citations omitted).

Existing standards (see pages 19-21, *supra*) ensure that the taxpayer has suffered the sort of injury required by *Flast*.

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in religious activity." That statement makes clear that the Framers' concern went far beyond grants to churches, and included other means of expending federal funds to provide support to religion.

Accordingly, the Government is wrong in suggesting that *Flast* must be narrowed dramatically, with radical new restrictions that are wholly inconsistent with the Framers' concerns and this Court's rationale, in order to ensure the existence of an injury sufficient to satisfy Article III.[23]

2. *Existing Principles Governing Taxpayer Standing Prevent Intrusion On Legitimate Separation of Powers Interests.*

The government's invocation of separation of powers principles is also inapposite. Conventional standing principles screen out the insubstantial claims that the government fears. They also ensure that taxpayer standing will only be available for the type of injury that was the focus of the Framers' attention. See pages 19-21, *supra*.

The government's concerns that taxpayer claims might force federal courts to adjudicate constitutional claims by plaintiffs without sufficient actual injury are therefore misplaced. Similarly, courts will not be flooded with claims challenging "every governmental encounter with religion" (Pet. Br. 47). Speeches and meetings of executive branch

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[23] Amici urge the Court to overrule *Flast* as inconsistent with Article III's injury-in-fact requirement. See Br. of States of Indiana *et al.* at 14-25; Br. of Foundation for Moral Law at 14-20. In *Flast*, the Court expressly and directly rejected the argument amici now seek to revive, that a taxpayer's assertion of an Establishment Clause injury constitutes "no more than the mere disagreement by the taxpayer with the uses to which tax money is put." 392 U.S. at 98 (citation and internal quotation marks omitted). *Flast* has been applied to uphold standing in nearly a dozen cases in this Court (see pages 16-17, *supra*) and numerous cases in the lower courts. And this Court just reaffirmed this understanding of *Flast* in *DaimlerChrysler*. There simply is no basis for the dramatic step urged by amici.

personnel by themselves simply do not satisfy the applicable standing requirement.[24]

Finally, clearly explaining the rationale underlying *Flast*, reaffirming the existing limits on taxpayer standing, and applying those limits to the facts of this case will provide lower courts with clear guidance for addressing claims of taxpayer standing. Indeed, it is adoption of the government's unprecedented restrictions on standing that would create confusion in an area in which the lower courts have been fairly successful in separating legitimate and illegitimate claims. See page 18 & note 5, *supra*.

E. The Amended Complaint Alleges Facts Sufficient To Establish Respondents' Standing As Taxpayers To Challenge The Expenditures At Issue In This Action.

Here, the alleged violation of the Establishment Clause is petitioners' program of conferences, which respondents allege are designed to give religious organizations a preference in the grant process. See pages 6-7, *supra*. Those allegations are plainly sufficient to establish respondents' standing to sue

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[24] Many States have taxpayer standing rules broader than *Flast* – and with respect to unlawful acts generally. See, *e.g.*, *Williams* v. *Lara*, 52 S.W.3d 171, 179 (Tex. 2000) ("Taxpayers in Texas have standing to enjoin the illegal expenditure of public funds, and need not demonstrate a particularized injury."); *Louisiana Associated Gen. Contractors, Inc.* v. *Calcasieu Parish Sch. Bd.*, 586 So. 2d 1354, 1358 (1991); *Danzl* v. *City of Bismarck*, 451 N.W.2d 127, 129 (N.D. 1990); *Washington ex rel. Boyles* v. *Whatcom County Superior Court*, 694 P.2d 27, 30 (Wash. 1985); *Zeigler* v. *Baker*, 344 So. 2d 761, 763-64 (Ala. 1977); *Kirk* v. *Clark*, 4 S.E.2d 13, 15 (S.C. 1939). In these States, which include some of the amici in this case, a flood of lawsuits has not occurred and state government has neither ground to a halt nor been dominated by judicial decisions. That experience, combined with the existing, much more stringent limitations in this Court's jurisprudence, provides strong evidence that the government's fears are unjustified.

as taxpayers. Indeed, if Congress had authorized the FBCI Office conferences by incorporating the provisions of the executive orders into a statute, and a taxpayer challenged the expenditures for that program on the ground that it granted a preference to religious organizations, standing would be clear. The result should be no different simply because the program was instead created by executive order.

The challenged expenditures plainly are traceable to the alleged unconstitutional conduct. Respondents challenge the entire program. As the court of appeals concluded, "since the program itself is challenged as unconstitutional" (Pet. App. 16a) respondents have shown the requisite link between their injury and the challenged conduct. Because respondents' claim satisfies the standard that this Court has established for taxpayer claims under the Establishment Clause, respondents have standing to pursue this action.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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